IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 2ND FEBRUARY 2007 / 13TH MAGHA 1928

RFA.No. 500 of 2004()

OS.136/1986 OF THE PRINCIPAL SUB COURT,KOTTAYAM

APPELLANT/6TH DEFENDANT:

AVIRAH @ AVIRACHAN, S/O FRANCIS, AGED 65,
KOLLIYIL HOUSE, THALAPPALAM VILLAGE.

BY ADV. SRI.ABRAHAM MATHEW (VETTOOR)

RESPONDENTS: PLAINTIFF AND DEFENDANTS 3 TO AND 7 TO 13:

1. ANNA @ ACKAMMA JOHN, AGED 65 YEARS,
MACHIYANIYIL HOUSE, BHARANANGANAM KARA,
BHARANANGANAM VILLAGE.

2. ALEY @ ACHAMMA, W/O. THOMAS,
KOTTUMKAL HOUSE, THELLAKOM KARA,
ETTUMANNOOR VILLAGE.

3. K.T. THOMAS, S/O. THOMAS,
KOTTUMKAL HOUSE, VALAYIL PURAYIDOM
MELAMPARA, THALAPPALAM VILLAGE.

4. TOMY THOMAS, S/O. THOMAS,
KOOTTUMKAL HOUSE, BHARANANGANAM VILLAGE,
ULLANAD KARA.

5. BRIGIT MATHEW, C/O. A.T. MATHEW,
ELAMPASSERIL HOUSE, MOONNILAVU P.O.,
KOTTAYAM-686 586.

6. T.C. MATHEW THANNIKUNNEL HOUSE,
POOVATHANI, KALATHOOKADAVU P.O., KOTTAYAM.

7. T.C. ANTONY, THANNIKUNNEL HOUSE,
NARIANGANAM P.O., BHARANANGANAM, KOTTAYAM.

8. ALEYKUTTY JOSEPH, C/O. JOSEPH CHACKO,
THANNIKKATTU HOUSE, KURUMANNU P.O.,
ELIVALI, KOTTAYAM.

9. T.C. DEVASIA, C/O. KURUVILLA SEBASTIAN
KOLLAMPARAMBIL, CHENNADU P.O., POONJAR.

10. T.C. CHACKO, THANNIKKUNNEL HOUSE,
ALAKODE P.O., OTTATHI, KANNUR.

11. T.C. JOSEPH, THANNIKKUNNEL HOUSE,
ALAKODE P.O., OTTATHI, KANNUR.

R1 BY ADV. SRI.P.RADHAKRISHNAN (1)
SRI.MADHU RADHAKRISHNAN
R4 BY ADV. SRI.B.KRISHNA MANI

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 02/02/2007, ALONG WITH RFA NO. 81 OF 2005 AND FAO NO. 223 OF 2004 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KURIAN JOSEPH & K.T. SANKARAN, JJ.

R.F.A. NO. 500 OF 2004,
R.F.A. NO. 81 OF 2005
and
F.A.O.NO. 223 OF 2004

Dated this the 2nd day of February, 2007

JUDGMENT

Sankaran, J.

R.F.A.Nos.81 of 2005 and 500 of 2004 arise out of the final decree and judgment dated 11.4.2003 in O.S.No.136 of 1986 Principal Sub Court, Kottayam, the former filed by the fifth defendant and the latter filed by the sixth defendant. F.A.O.No.223 of 2004 is filed by the fifth defendant challenging the appointment of Receiver.

2. O.S.No.136 of 1986 was filed by the first respondent in the appeals claiming partition. The trial court dismissed the suit on the ground that the contesting defendants have perfected title by adverse possession. Challenging the judgment and decree of the trial court, the plaintiff filed A.S.No.279 of 1988 before this Court, which was allowed by the judgment

dated 11.4.1997 and a preliminary decree was passed holding that the plaintiff is entitled to one-fourth share in the plaint schedule properties. It was also held that the plaintiff would be entitled to get mesne profits and the quantum of the same was directed to be considered in the final decree proceedings. Challenging the judgment of the learned single Judge in A.S.No.279 of 1988, three A.F.As were filed, namely, A.F.A.Nos.61 of 1997 by the sixth defendant, A.F.A. No.60 of 1997 by the fifth defendant and A.F.A.No.47 of 1997 by the fourth defendant. The Division Bench disposed of A.F.A.Nos.47 of 1997 and 60 of 1997 by a common judgment and following that judgment, A.F.A. No.61 of 1997 was also disposed of. The Division Bench held that the question of value of improvements claimed by the contesting defendants could be considered at the time of passing the final decree.

3. Plaintiff and defendants 1 to 3 are the children of Ouseph Devasia. Defendants 7 to 13 are the legal representatives of the deceased second defendant. Defendants 4 and 5 are the children of the third

defendant. The fifth defendant claims to be an assignee of item Nos. 1 and 2 of the decree schedule from the first defendant as per Ext.B21 gift deed dated 9.5.1986 and Ext.B22 sale deed dated 24.8.1985. The sixth defendant is an assignee of item Nos.4 and 5 from the first defendant as per Ext.B25, executed in the year 1962. It is stated that item No.3 is covered by a gift deed executed in favour of the fourth defendant. The fourth defendant has not filed any appeal challenging the final decree.

4. A Commissioner was appointed in the final decree proceedings. An extent of 1 acre 83 cents and 140 sq. links of land in item No.2 and an extent of 49.775 cents in item No.3 were allotted to the plaintiff. The sixth defendant being an assignee in respect of item Nos.4 and 5, he could not raise any objection in respect of the allotment of the aforesaid extents to the plaintiff from item Nos.2 and 3 and he cannot be said to be an aggrieved person by the allotment made to the plaintiff.

5. Various objections were raised by the appellants herein before the trial court. The trial court considered all the objections raised by the appellants in great detail. A final decree was passed accepting the allotment made by the Commissioner. The court below held that the plaintiff is entitled to recover mesne profits at the rate of Rs.25,000/- per year from 9.5.1986, the date of institution of the suit, till the date of final decree. For convenience, the court below assessed this period to be a period of seventeen years and accordingly, it was held that the plaintiff is entitled to realise a sum of Rs.4,25,000/- with interest at the rate of 6% per annum from the date of final decree till realisation as mesne profits from defendants 4 to 6. It was also held that defendants 4 and 5 are entitled to realise Rs.34,000/- and Rs.1,36,690/- respectively, with interest at the rate of 6% from the date of final decree till the date of realisation from the plaintiff as value of improvements.

6. As stated earlier, the sixth defendant being

not affected by the allotment of properties from item Nos.2 and 3 of the plaint schedule since he is an assignee in respect of item Nos.4 and 5, we do not find any merit in the appeal filed by the sixth defendant as R.F.A.No.500 of 2004 as regards allotment of shares, valuation etc.. The court below considered the objections raised in respect of the valuation, allotment, measurement, value of improvements etc. in detail and rejected the contentions raised by the appellants in the Appeals by a detailed order. We do not find any merit in the contentions raised by the appellants challenging the Commissioner's report and final decree passed by the court below.

7. Finally, it was contended that the court below having found that rubber was planted in 1985, there was no justification for awarding mesne profits at the rate of Rs.25,000/- per year from 9.5.1986. It is submitted by all the counsel that it would take seven years to get yield from rubber trees. Therefore, we find merit in the contention raised by the appellants challenging the quantum of mesne profits.

It would be just and proper to reduce the period for which mesne profits is to be paid, from seventeen years to eleven years. Accordingly, the direction in the final decree to pay mesne profits at the rate of Rs.25,000/- per year for a period of seventeen years and quantifying the same at Rs.4,25,000/- till the date of final decree is modified as hereunder. We hold that the plaintiff would be entitled to get mesne profits for a period of eleven years till the passing of the final decree at the rate of Rs.25,000/- per year. The plaintiff shall also be entitled to get interest at 6% per annum from the date of final decree till the date of realisation. No other modification is called for.

8. In the result, R.F.As are allowed in part and the quantum of mesne profits is modified in the manner indicated above. In all other respects, the final decree as passed by the court below shall stand confirmed.

As regards F.A.O.No.223 of 2004, the appeal has become infructuous and it is accordingly dismissed.

The court below shall take steps to discharge the Receiver.

(KURIAN JOSEPH)
Judge

(K.T.SANKARAN)
Judge

ahz/